

Hospitals Providing Medical Care to Federal Employees Covered by HMOs May Be Subject to OFCCP's Affirmative Action and Other Requirements

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Over the years, the Office of Federal Contract Compliance Programs (OFCCP), which enforces affirmative action and equal opportunity regulations for federal contractors and subcontractors, has tried to assert jurisdiction over hospitals that provide medical care to federal employees in various controversial ways. For example, OFCCP has claimed hospitals are federal subcontractors when they provide medical services to Blue Cross/Blue Shield and/or HMO policyholders pursuant to the insurance providers' agreements with the Office of Personnel Management (OPM). The U.S. District Court for the District of Columbia just gave the green light to OFCCP to assert its jurisdiction over hospitals, at least where HMOs covering federal employees are involved.

In *UPMC Braddock v. Harris* (D.D.C. No. 09-01210, 3/30/13), the D.C. district court held that three hospitals affiliated with the University of Pittsburgh Medical Center (UPMC) are federal subcontractors based on their providing medical services to federal employees covered by an HMO that in turn contracts with the OPM to provide coverage for federal employees participating in the Federal Employees Health Benefits Program. This case has been pending since 2009, and upholds the decision of the Department of Labor's Administrative Review Board (ARB) that the hospitals are federal subcontractors.

This decision is significant for many reasons. First, the contract between OPM and the HMO expressly excluded providers of direct medical services or supplies from the definition of subcontractor. The district court held that OPM and the HMO

had no power to limit the scope of federal laws or executive orders and therefore the contract language excluding providers of medical services and suppliers has no effect on whether the providers are federal subcontractors. Second, the hospitals claimed they did not meet the definition of subcontractor under the applicable Department of Labor regulation because the hospitals provide "personal services," whereas the regulation covers "nonpersonal services." The district court rejected this argument, finding that "nonpersonal services" refers to the relationship between the subcontractor's personnel and the contracting government agency, not the relationship between the subcontractor's personnel and the individuals benefitting from the subcontract. Third, the court held that the hospitals were federal subcontractors even though the contract between the hospitals and the HMO did not contain any reference to the statutory or regulatory provisions that govern federal contractors and subcontractors, and the hospitals never agreed to be bound by those statutory and regulatory provisions.

In deciding *UPMC Braddock*, the district court also addressed another case involving a hospital's status as a federal subcontractor. In *OFCCP v. Bridgeport Hospital*, ARB Case No. 00-034, 2003 WL 244810 (Jan. 31, 2003), the ARB held that the OFCCP lacked jurisdiction over a hospital that provided medical services to Blue Cross/Blue Shield policyholders pursuant to the insurer's contract with OPM to provide federal employees with health insurance. In that case, the ARB found that the contract between Blue Cross/Blue Shield and OPM was to provide health insurance, not medical services. Therefore, the hospital's provision of medical services to

Blue Cross/Blue Shield policyholders was not necessary to the performance of the federal contract between OPM and the insurer. The court in *UPMC Braddock* distinguished *Bridgeport Hospital*, finding that the HMO is both an insurer and a provider of health care services and that the HMO agreed to provide medical care in its contract with OPM. Therefore, the hospitals' provision of medical services was necessary to the performance of the federal contract and subjected the hospitals to OFCCP jurisdiction as federal subcontractors.

The *UPMC Braddock* decision will only further embolden the OFCCP. Hospitals and other health care providers that provide medical services to federal employees covered by HMOs, and

those that have contracts or subcontracts with federal agencies such as the Department of Health and Human Services, should assess their potential status as federal contractors or subcontractors and understand the affirmative action and other obligations associated with this status.

If employers have any questions or concerns, they should contact a member of Cozen O'Connor's Labor & Employment Department for more information about these changes.